MEMORANDUM

TO: Ad Hoc Committee on Rules of Evidence

FROM: Subcommittee on Undesignated Rules in Articles VIII – XI; Follow-up on Rules 609 and 611

DATE: August 2, 2010

RE: Recommended Action

I. BACKGROUND

At the committee's third meeting on June 18, 2010, Justice Hurwitz created the Subcommittee on Article VIII Residual Exceptions and Last ¶ of FRE 801, and the Subcommittee on Former Testimony. Justice Hurwitz assigned all undesignated rules to an ad hoc subcommittee consisting of himself, Carl Piccarreta, and Judge Armstrong. Subsequently, Judge Miller joined the ad hoc subcommittee. A review of the undesignated rules revealed significant differences between the Arizona and federal rules only with respect to Rules 801(d)(1)(A), 803(6) and (8), 1101, and 1102. In reviewing these rules, which are individually addressed below, the subcommittee was mindful of the committee's apparent preference to make the rules consistent absent "good reason."

Also at the committee's third meeting, Justice Hurwitz asked Judge Armstrong to take a look at the history of Rules 609 and 611. These rules are also addressed below.

II. RULE 609

At the last meeting, the committee discussed numerous issues concerning Rule 609, including: (1) why the Arizona rule uses "credibility"; (2) whether to add the last clause of FRE 609(a)(2) to the Arizona rule; and (3) what are the ramifications of amending ARE 608, as recommended, but not ARE 609. Justice Hurwitz asked the Rule 609 Subcommittee to ascertain whether Arizona case law makes any distinction between "credibility" and "character for truthfulness." Justice Hurwitz stated he would attempt to determine why the federal rules distinguish between the two terms. Justice Hurwitz and Judge Armstrong agreed to look at the history of the two versions of the rule. Following is what Judge Armstrong discovered with respect to ARE 609.

ARE 609 is based on FRE 609 and Fed. R. Crim. P. 43(b). ARE 609 has been amended only once in 1988. The 1988 amendment, however, made no substantive changes to the rule. The amendment merely changed three references to "he" or "him" in subsection (a) to "the witness" in order to make the references gender neutral. These changes followed 1987 technical changes to FRE 609. Similar changes were made in 1988 to ARE 611(c) and other rules of evidence.

III. RULE 611

At its last meeting, the committed reached consensus to adopt FRE 611(a) and (c) with comments as recommended in the subcommittee report, dated June 3, 2010, subject to a review of the 1995 Arizona petition, comments and order, if available, with respect to

subsection (c) only. The committee further reached consensus not to change subsection (b). Judge Armstrong agreed to attempt to determine how the Arizona comment came about. He discovered the following.

On November 23, 1994, the Committee on the More Effective Use of Juries, through the Administrative Office of the Courts, filed a petition designed to accomplish significant jury reform (R-94-0031). The petition, a copy of which is attached, proposed to add the following language to ARE 611: "The court may impose reasonable time limits on the trial proceedings or portions thereof"; and to add the comment that was ultimately adopted.[1]

The petition explained the committee's recommendation concerning time limits as follows:

> In the interest of using judicial resources efficiently, and having evidence presented effectively, the Rules of Civil and Criminal Procedure and Evidence authorize trial judges to place time limits on entire trials and portions thereof. To encourage judges to exercise this authority to better manage trials, the Committee recommends adding more explicit language to Civil Rule 16, Criminal Rule 16.3, and Evidence Rule 611. . .

The petition explained the committee's recommendation to add the comment to ARE 611(a), as follows:

> Jurors complain and the researchers confirm that trials frequently involve an excessive number of exhibits which too often confuse jurors and interfere with their comprehension.
>
> > The trial judge should control the number of exhibits, have relevant portions of documents that are admitted highlighted for the jury and provide copies of key documents to the jurors. In document-intensive cases, the judge should provide an index or retrieval system for the jury's use during deliberations. For the control and safeguarding of documents

[1] The only changes in the comment from petition to adoption were the addition of the prefatory sentence (recommended in comment by MCAO)) and the language "during the course of trial" at the end of paragraph (4).

in an especially paper-intensive trial, a document depository should be considered. "Jurors: The Power of 12," p. 85.

The vast majority of commentators[2] approved of the addition of the proposed comment but several commentators opposed the proposed new language in ARE 611 concerning time limits. For example, the Maricopa County Superior Court opposed the new language, as did Douglas Irish, who opposed the language because "[m]aking a special rule would encourage judges to be heavy-handed about this."

In an order filed October 24, 1995, the Court approved the committee's recommendations and, on the State Bar's recommendations, added "Time Limitations" to the title of Rule 611(a) and added the new time limitation language at the end of Rule 611(a).[3] All changes were effective December 1, 1995.

ARE 611(b) and (c) have not changed since their original adoption.

IV. RULE 801(d)(1)(A)

Arizona did not adopt the phrase in the federal rule that requires that the prior inconsistent statement of a witness, in order to be excluded from the definition of hearsay, must have been made under oath in a trial, hearing or deposition. According to McAuliffe and Wahl, "[t]his was due to the fact that, in *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973), the Arizona Supreme Court had approved and adopted the standard set forth in the then proposed Rule 801(d)(1)(A) of the Federal Rules, before Congress added the limiting language. *But cf.*, *State v. Cruz*, 128 Ariz. 538, 627 P.2d

[2] The Civil Practice and Procedure Committee of the State Bar opposed the comment, however, as "micromanagement."
[3] The petition did not recommend where to place the new time limitation language in Rule 611.

689 (1981)." Arizona Practice Series: Law of Evidence § 801:2 (Daniel J. McAuliffe & Shirley J. Wahl eds., rev. 4th ed. 2008).

Cruz makes clear that in the absence of a requirement that the prior statement be made under oath, the trial will often devolve into a dispute about whether the prior statement was in fact made. *Cruz* created a limitation—an unsworn statement cannot be used to establish the defendant's guilt, which all but swallows up the difference in criminal cases. It seems to follow that in civil cases, it would be unfair to use a disputed statement—as the issue will never arise when the witness agrees that he or she made the statement—to establish liability. We should also point out, however, *Cruz*'s characterization of the federal rule as "unduly restrictive." 128 Ariz. at 541, 627 P.2d at 692. This characterization may be unfair, however, considering that unsworn prior inconsistent statements have always been admissible for impeachment purposes under FRE 613.

The subcommittee recommends that the Arizona rule be amended to be consistent with the restyled federal rule, as follows:

> **(d) Statements which are not hearsay.** A statement is not hearsay if--
>
> (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . .

V. RULE 803(6) and (8)

The difference between ARE 803(8) and FRE 803(8) is purely stylistic. The clause "unless the sources of information or other circumstances indicate lack of trustworthiness," appears at the beginning of the Arizona rule and at the end of the

federal rule. The subcommittee recommends that the federal version, as restyled, be adopted in Arizona. Thus, the Arizona rule would read as follows:

> **(8) Public records. ~~and reports.~~** ~~Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.~~
>
> A record or statement of a public office if:
>
> **(a)** it sets out:
>
> **(i)** the office's activities;
>
> **(ii)** a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
>
> **(iii)** in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
>
> **(b)** neither the source of information nor other circumstances indicate a lack of trustworthiness.

There are more significant differences between ARE 803(6) and FRE 803(6). According to McAuliffe and Wahl, however:

> Even there, the differences are principally stylistic, except that the Arizona Rule requires that the record be made by, or from information transmitted by, a person with firsthand knowledge acquired in the course of a regularly conducted business activity. The Arizona Rule also provides that the record is not admissible to the extent that portions of it lack the appropriate foundation, which suggests that the portions which do have an appropriate foundation may be admitted separately. The Arizona Rule also does not contain reference to the new certification standards of Rule 902 added to the Federal Rule in 2000.

Arizona Practice Series: Law of Evidence § 803:2 (Daniel J. McAuliffe & Shirley J. Wahl eds., rev. 4th ed. 2008). The subcommittee recommends that the federal version, as restyled, be adopted in Arizona, as follows:

> **(6) Records of regularly conducted activity.** ~~A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if:~~
>
> ~~(a) Made at or near the time of the underlying event,~~
>
> ~~(b) by, or from information transmitted by, a person with first hand knowledge acquired in the course of a regularly conducted business activity,~~
>
> ~~(c) made and kept entirely in the course of that regularly conducted business activity,~~
>
> ~~(d) pursuant to a regular practice of that business activity; and~~
>
> ~~(e) all the above are shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11).~~
>
> ~~However, such evidence shall not be admissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness or to the extent that portions thereof lack an appropriate foundation.~~
>
> ~~The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.~~
>
> A record of an act, event, condition, opinion, or diagnosis if:
>
> **(a)** the record was made at or near the time by — or from information transmitted by — someone with [first hand] knowledge;[4]
>
> **(b)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> **(c)** making the record was a regular practice of that activity;

[4] ARE 803(6) uses the term "first hand knowledge" while FRE 803(6) uses only "knowledge."

> **(d)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> **(e)** neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

In FRE 803(6), as restyled, the phrase "records, reports, statements, or data compilations, in any form," has been condensed into "a record or statement." Similarly, in FRE 803(8), as restyled, the phrase "memorandum, report, record, or data compilation, in any form," has been condensed into "record." To make clear that these changes are stylistic only, restyled FRE 803 will include the following Committee Note:

> The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The subcommittee recommends that a similar comment be added to ARE 803 and any other rules that are restyled. The subcommittee also recommends that separate comments be added to any rules that are otherwise amended to be consistent with their federal counterparts, including the nature of the changes.

The subcommittee discussed the meaning of "record" and the potential impact of simplifying the notion of "record," but ultimately concluded that, in light of the proposed comment, the restyling change creates no ambiguity that does not already exist. One subcommittee member suggested changing "recording" to "record" in ARE 1001(1), and another member suggested separately defining "record" in ARE 1001. The subcommittee proposes that these suggestions be further discussed by the full committee.

Finally, the subcommittee discussed that ARE 803(6) requires that the record be made or transmitted by someone with "first hand knowledge" while FRE 803(6) requires only "knowledge." The requirement of "first hand knowledge" has been part of the Arizona rule since its inception. Likewise, the federal rule has used "knowledge" since its inception although the Notes of the Advisory Committee observed that Model Code Rule 514 requires "personal knowledge" and FRE 803(6) "follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity." Further light is shed by the following excerpt from the Notes of Committee on the Judiciary, Senate Report No. 93-1277:

> It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

Accord *Phoenix Associates III v. Stone,* 60 F.3d 95, 101 (2d Cir.1995) (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 803(6)(b)[04], at 803-201-04 (1994)).

Conforming the Arizona rule to the federal rule may well be appropriate, particularly in light of the rule's separate requirement that the source be trustworthy.

In the end, however, the subcommittee had no strong feeling about whether or not Arizona should retain its current requirement for "first hand knowledge."

VI. RULE 1101

There are significant differences between ARE 1101 and FRE 1101. As noted by McAuliffe and Wahl:

> In Rule 1101(a), Arizona incorporated significant editorial revisions to adapt the Rule to the Arizona court system. Rule 1101(b), Ariz. R. Evid. does not contain a provision making the Rule applicable to admiralty and maritime cases, and provides that the Rules do not apply where "otherwise provided in the Arizona Rules of Criminal Procedure." Rules 1101(c) and (d), Ariz. R. Evid. are substantially identical to Rules 1101(c) and (d)(2), Fed. R. Evid. The Arizona Rule does not have provisions corresponding to Rules 1101(d)(1), (d)(3), and (e) of the Federal Rules.

Arizona Practice Series: Law of Evidence § 1101:2 (Daniel J. McAuliffe & Shirley J. Wahl eds., rev. 4th ed. 2008).

The subcommittee recommends no changes to ARE 1101(a), (b) and (c), which are either consistent with the federal rule or include provisions unique to Arizona. There are, however, significant differences between ARE 1101(d) and FRE 1101(d). The subcommittee does not recommend changing the Arizona rule to be consistent with the federal rule for three reasons: (1) the reference to Rule 104 in the federal rule is duplicative of Rule 104 itself and therefore unnecessary; (2) conforming the rules might inject uncertainty into the Arizona rule; and (3) ARE 1101(b) already includes an exception "as otherwise provided in the Arizona Rules of Criminal Procedure." However, the subcommittee recommends that ARE 1101(d) be restyled consistent with the federal restyling to provide as follows:

(d) ~~Rules inapplicable.~~ ~~The rules (other than with respect to privileges) do not apply to proceedings before grand juries.~~ **Exceptions.** These rules — except for those on privilege — do not apply to grand jury proceedings.

VII. RULE 1102

Currently, ARE 1102 is "deleted." To be consistent with its restyled federal counterpart, the subcommittee recommends that the rule be amended to read as follows:

> These rules may be amended as provided in Rule 28, Rules of the Supreme Court.

Atch: Petition, R-94-0031